



## CITY OF LODI COUNCIL COMMUNICATION

**AGENDA TITLE:** Discussion Regarding Proposed Audit (Agreed-Upon Procedures) Of Envision Law Group's Billings And Authorization To Execute Contract With Barger & Wolen LLP

**MEETING DATE:** December 9, 2003

**PREPARED BY:** Mayor Larry Hansen

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**RECOMMENDED ACTION:** That the City Council authorize the Mayor to execute the contract with Barger & Wolen LLP for the initial audit (agreed-upon procedures) of Envision Law Group's billings.

**BACKGROUND INFORMATION:** At the November 19, 2003, City Council meeting, the Council approved the following two motions:

- To move forward on item one of the motion made on September 17, 2003 (i.e. 1. Financial agreement with Lehman Bros., Inc.; evaluation to include possible ramifications to the City of various scenarios that could occur) and engage an outside professional firm to audit billing records of Envision Law Group; and that items two and three of the motion made on September 17, 2003 (i.e. 2. Determine other potential options and strategies that the City could pursue in regard to the PCE/TCE litigation; and 3. Valuation of the City's current strategy) be stayed until such time as Council deems it necessary to proceed.
- Authorized that the law firm of Barger & Wolen LLP be retained pending successful resolution of any conflicts and a background/reference check; appropriated an initial retainer of \$50,000; and authorized Council Member Hansen and Mayor Hitchcock to negotiate the contract, which will then be reviewed by the City Council before being formally initiated.

Since that meeting, I have met with attorneys Robert G. Levy and David J. McMahon of the law firm of Barger & Wolen. Mr. Levy has experience in insurance coverage, professional liability litigation, and attorneys fee dispute issues. Mr. McMahon has experience in complex business disputes, financial and regulator litigation, environmental cost containment, and appellate work. (Please refer to Exhibit A, agenda Item B-1 from the November 19 City Council meeting.)

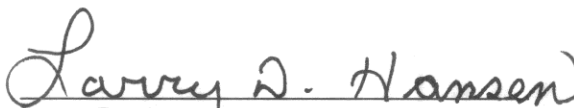
Also please find Exhibit B (list of references), Exhibit C (proposed contract), Exhibit D (letter from Robert Levy dated November 26, 2003), and Exhibit E (a conflict disclosure).

I am in the process of calling the references and will report the results on December 9. I believe the approval of this contract is an important step in responding to the many questions that have been raised by the public and Council Members. I also believe that timing is a critical element to success. We need to get this audit in motion as quickly as possible.

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APPROVED: \_\_\_\_\_  
H. Dixon Flynn, City Manager

**FUNDING:** None required—\$50,000 appropriated on November 19, 2003.

  
Larry D. Hansen  
Mayor

LDH/jmp

Attachments

Exhibit A Agenda Item I-1 (November 19, 2003 City Council agenda)  
Exhibit B List of references  
Exhibit C Proposed contract  
Exhibit D Letter from Robert Levy dated November 26, 2003  
Exhibit E A conflict disclosure



## CITY OF LODI COUNCIL COMMUNICATION

**AGENDA TITLE:** Discussion Regarding Proposed Audit (agreed-upon procedures) of Envision Law Group's Billings

**MEETING DATE:** November 19, 2003

**PREPARED BY:** Council Member Larry Hansen

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**RECOMMENDED ACTION:** That Council discuss the proposed audit (agreed-upon procedures) of Envision Law Group's billings and 1) authorize that the law offices of Barger & Wolen LLP be retained, 2) appropriate an initial retainer of \$50,000, and 3) authorize Council Member Hansen and Mayor Hitchcock to negotiate a contract.

**BACKGROUND INFORMATION:** As the City's lengthy and complicated environmental abatement program litigation moves forward, there are many issues to be resolved. Some of the issues raised by Council Members, the media, and/or citizens focus on the financing of the litigation, the cost of the litigation, and the length of the litigation. Because of these concerns, the City Council voted to seek a second opinion (refer to Council Communication and minutes from September 17, 2003). Council Member Beckman made a motion, Hitchcock second, to direct the City to officially seek a professional evaluation/additional opinion on the following matters related to the environmental abatement program:

1. Financial agreement (with Lehman Bros., Inc.), evaluation to include possible ramifications to the City of various scenarios that could occur;
2. Determine other potential options and strategies that the City could pursue in regard to the PCE/TCE litigation; and
3. Valuation of the City's current strategy.

The above motion carried by the following vote:

Ayes – Council Members: Beckman, Hansen, and Mayor Hitchcock

Noes – Council Members: Howard and Land

Council Member Hansen and Mayor Hitchcock were charged with the responsibility of finding attorneys to offer the second opinion. Approximately 15 attorneys/law firms have been interviewed by either Council Member Hansen or Mayor Hitchcock. During this process, two attorneys were found with experience in auditing lengthy and costly litigation cases. Mayor Hitchcock and Council Member Hansen interviewed the attorneys, Robert G. Levy and David J. McMahon of the law firm Barger & Wolen LLP. Mr. Levy has concentration in insurance coverage, professional liability litigation, and attorneys' fee dispute issues for

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APPROVED: \_\_\_\_\_  
H. Dixon Flynn, City Manager

the past 22 years. He was formerly the coverage counsel, statewide, for a major California legal malpractice insurer. He is qualified as a trial expert witness on the duties of insurance coverage counsel, and he has served as an expert witness on allocation between covered and non-covered claims in patent infringement litigation. Mr. McMahon has worked for Barger & Wolen LLP since January 1995, and his practice areas are complex business, financial and regulatory litigation, environmental cost containment practice, and appellate work.

Barger & Wolen LLP was retained as Associate Remedial Liaison Counsel in the Lincoln Properties case. In this role, they were hired by the Settling Dry Cleaning Defendants to review and analyze the bills submitted for payment by the law firm of Zevnik, Horton, Guibord & McGovern, et al. (the "Zevnik firm"). The Zevnik firm was performing oversight and monitoring on behalf of their client, Lincoln Properties, in an environmental cleanup taking place at a shopping center located in Stockton. At that time Mr. Michael Donovan worked for the Zevnik firm, and eventually moved to the Envision Law Group. Barger & Wolen was also asked to review and analyze the invoices submitted by a number of the consultants who worked on the case with the Zevnik firm.

During their retention, where they observed bills that did not comply with generally accepted billing practices or which were not properly documented, Barger & Wolen filed dispute petitions in court in accordance with the case management order which was applicable in that case. The petitions were heard and decided by the Honorable David H. Weinstein with Judicial Arbitration & Mediation Services (JAMS) who was serving as Special Master, appointed by the Honorable David Levi. In certain cases, the decisions of Judge Weinstein were appealed to the federal district court judge who was in charge of the case, the Honorable David Levi.

Ultimately, Barger & Wolen LLP was involved in bringing a motion to amend the consent decree, which governed the cleanup in the case. The motion resulted in a resolution of the case through settlement.

#### Summary of Barger & Wolen LLP Qualifications:

1. Over the years, Barger & Wolen LLP has worked on more than 60 cases dealing with issues relating to litigation management, the reasonableness of attorneys' fees and the ethics of hourly billing. In the past several years, Barger & Wolen has been involved in cases decided by the Arizona, Montana, Georgia, and Florida Supreme Courts wherein ethical issues pertaining to the use of billing guidelines, legal auditing, and related issues have been decided.
2. Since 1991 Barger & Wolen LLP has litigated dozens of cases in which ethical considerations and/or the reasonableness of attorneys' fees and costs have been the central issue. During the last ten years, they have served as a litigator and consultant in a wide range of fee dispute cases, including environmental contamination, toxic tort matters, mass tort litigation, asbestos litigation, complex commercial disputes, and insurance overage/fee disputes. These cases have often involved disputes between clients and independently retained counsel, *Cumis* fee disputes, panel counsel fee disputes and attorneys' fee arbitrations. Since 1991 they have reviewed and analyzed hundreds of millions of dollars in law firm invoices reflecting legal fees and costs generated in litigation matters.
3. As a litigator of attorneys' fee cases, Barger & Wolen LLP has been involved in appellate advocacy, litigation, arbitration, and mediation concerning law firm fees and related ethical issues in many jurisdictions throughout the United States, including California, Florida, Texas, Alaska, Arizona, Georgia, Montana, Tennessee, and Utah.

4. Barger & Wolen LLP is constrained from providing details about some of these matters because of confidentiality orders or stipulations, which prohibit us from disclosing detailed information including, in some instances, the identity of the law firms involved.
5. As a consultant to various clients and companies in attorneys' fees matters, they have assisted clients, including corporations and insurance companies in drafting attorney billing guidelines for use by attorneys defending complex litigation.
6. Barger & Wolen LLP has also worked on a number of cases in which law firms have hired their firm to assist in their analysis of the reasonableness and necessity of fees and costs in ongoing litigation.

This law firm has the expertise and experience necessary to determine if the legal fees incurred by the City have been reasonable and necessary.

**FUNDING:**                      Water Fund              \$50,000

Ruby R. Paine for  
Vicky McAthie, Finance Director

Larry D. Hansen  
Larry D. Hansen  
Council Member

**BARGER & WOLEN<sup>LLP</sup>**

650 California Street  
Ninth Floor  
San Francisco, California 94108  
Telephone: (415) 434-2800  
Facsimile: (415) 434-2533

DAVID J. McMAHON  
(415) 743-3706  
dcmahon@barwol.com

PLEASE REFER TO  
OUR FILE NUMBER:  
01000.045

November 25, 2003

Larry Hansen  
City of Lodi  
221 West Pine Street  
P. O. Box 3006  
Lodi, California 95241-1910

Re: List of References for Barger & Wolen

Dear Larry:

Pursuant to your request, we provide the following list of references for your consideration. We have provided names, addresses and phone numbers. Some of these individuals are familiar with our firm's general practice. Others have observed the work we have done in the area of litigation management and legal auditing. We stand ready to provide you with any further information you require on request.

1. Daniel J. Wallace, Esq.  
City Attorney  
City of Santa Barbara  
740 State Street, Suite 201  
Santa Barbara, CA 93102-1990  
Phone: (805) 564-5331  
Fax: (805) 897-2532
2. Matt Granger, Esq.  
Assistant City Attorney  
City of Lompoc  
Post Office Box 8001  
Lompoc, CA 93438-8001  
Phone: (805) 736-1261  
Fax: (805) 736-8681

BARGER & WOLEN LLP

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November 25, 2003  
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3. Marty Myers, Esq.  
Heller Ehrman White & McAuliffe LLP  
333 Bush Street  
San Francisco, CA 94104-2878  
Phone: (415) 772-6208  
Fax: (415) 772-6268  
Email: [mmyers@hewm.com](mailto:mmyers@hewm.com)
4. Robert Hines, Esq.  
Farrella, Braun & Martell  
235 Montgomery Street, 30<sup>th</sup> Floor  
San Francisco, CA 94104  
Phone: (415) 954-4400  
Email: [rhines@fbm.com](mailto:rhines@fbm.com)
5. Robin D. Craig, Esq.  
Craig & Winkelman LLP  
2150 Shattuck Avenue  
Suite 1220  
Berkeley, California 94704  
Phone: (510) 549-33  
Fax: (510) 217-5894  
Home: (510) 420-1479
6. Martin S. Checov, Esq.  
O'Melveny & Myers LLP  
275 Battery Street  
Embarcadero Center West  
San Francisco, CA 94111-3305  
Phone: (415) 984-8700
7. James M. White, Esq.  
American International Group  
80 Pine Street, 6<sup>th</sup> Floor  
New York, New York 10005  
Business Phone: (212) 770-1801  
Email: [james.white@aig.com](mailto:james.white@aig.com)
8. James Wagoner, Esq.  
McCormick, Barstow, Sheppard, Wayte & Carruth LLP  
P. O. Box 28912

BARGER & WOLEN LLP

Larry Hansen  
November 25, 2003  
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Fresno, CA 93729-8912  
Phone: (559) 433-1300  
Fax: (559) 433-2300

9. Robert C. Goodman, Esq.  
Law Offices of Robert Goodman LLP  
177 Post Street, Suite 600  
San Francisco, CA 94108  
Phone: (415) 777-2210
10. Peter Siggins, Esq.  
Legal Secretary (to Governor Schwarzenegger)  
(916) 445-0873
11. Paul Derecktor  
President and CEO Derecktor Shipyards  
311 E. Boston Post Road  
Mamaroneck, New York 10543  
Phone: (914) 698-5020

Please call us if you have any question about this list of references.

Very truly yours,



ROBERT G. LEVY  
For the Firm



DAVID J. McMAHON  
For the Firm

DJM:rw



BARGER & WOLEN LLP

650 California Street

Ninth Floor

San Francisco, California 94108

Telephone: (415) 434-2800

Facsimile: (415) 434-2533

**EXHIBIT C**

DAVID J. MCMAHON  
(415) 743-3706  
dmcma@barwol.com

PLEASE REFER TO  
OUR FILE NUMBER:  
01000.045

November 25, 2003

Larry Hansen  
City of Lodi  
City Hall  
221 West Pine Street  
P. O. Box 3006  
Lodi, California 95241-1910

This letter is written to confirm the terms under which this law firm (the "firm," "we" or "us") has been retained by the City of Lodi (the "client" or "you") to render legal services.

Services Description. The general nature of the services to be rendered is as follows:

1. We have been retained by the City of Lodi to perform a legal audit of the fees and costs incurred by the Envision law firm, as well as the various consultants and experts retained by it or by the City of Lodi at Envision's direction.
2. We have also been hired by the City of Lodi to review and analyze the Financing Agreement entered into between the City of Lodi and Lehman Brothers, (the "Program Receipts Sale and Repurchase Agreement dated as of June 1, 2000 between the City of Lodi, As Seller and repurchaser, and Lodi Financing Corporation as Purchaser").
3. The scope of our retention will also include outlining the legal remedies and options available to the City of Lodi with respect to issues and concerns that have arisen regarding items 1 and 2, above.

The services performed under this agreement may also include incidental services of a minor nature regarding other matters, each of which matters do not entail fees in excess of \$1,000. In the event that we are engaged in a subsequent matter not described above, the general nature of our fee arrangement shall also be evidenced by this letter. In connection with the foregoing, our services may consist of various activities which we, in our sole discretion, deem to be in the interest of the cause entrusted to us, including, without limitation, discussions with you, attorney inter-office conferences, telephone calls, writing any incidental correspondence, preparing legal documents and opinions, interviewing pertinent witnesses or other persons, traveling, representing you in legal proceedings involving actions or suits before state and federal

**BARGER & WOLEN LLP**

Larry Hansen, Esq.

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courts or agencies or other governmental bodies, preparing necessary research and documentation, and all other necessary matters for such representation.

Obligations of the Firm. For all litigation matters, the firm shall defend the client in the action specified in the "Services Description" section above, including as necessary: the preparation of pleadings, motions and related matters; conduct of discovery; filing of cross-complaints and any complaints against third parties relating to the action specified in the "Services Description" section above; conduct of settlement negotiations; and conduct of trial.

For all corporate matters, the firm shall draft or review all necessary documents and advise the client regarding the legal effect of all proposed terms and conditions; counsel the client regarding the legal consequences of the matter specified in the "Services Description" section above; and assist the client in obtaining all necessary permits and taking any other steps that may be necessary to complete the transaction.

Advice After Matter Completion. Unless specifically provided for herein to the contrary, our services are limited such that we have no obligation to advise you of any changes in the law or facts with respect to any matter that you have assigned to us after we have completed performing services with respect thereto.

No Guarantees. You acknowledge that we have made no assurances regarding the disposition or results of any phase of the matter or matters with which we are assisting you. Any expressions relating to possibilities of success are only our opinions as lawyers, and do not represent assurances of a particular outcome.

Legal Fees. You shall reimburse this office for legal fees and costs for services rendered based on our standard hourly billing rates in effect at the time the work is performed. Our present hourly rates for the personnel proposed to work on this engagement vary from \$90 to \$310. For the billing rates of individuals anticipated to work on your project and other standard fees and charges, please see Exhibit A. You agree that all fees and charges are subject to reasonable periodic increases subject to prior mutual agreement.

Costs Advanced. In addition to reimbursement for legal fees, you shall pay for all costs and expenses charged to you or advanced on your behalf. Costs charged include filing fees, telephone charges, document reproduction, travel costs such as plane tickets, cab fares, mileage and tolls, data processing charges, nonprofessional overtime, messenger charges and related services. Amounts we charge for data reproduction, services of our word processing division (for documents of 5 pages or more) and other services are billed as costs.

The firm shall not be obligated to pay or advance any such fees, costs, or expenses and it may, at its sole option, (1) require you to advance payment for any such costs or (2) arrange to have those costs directly billed to you. Notwithstanding this provision, the firm may at its sole option advance such costs as it deems appropriate and obtain reimbursement from the client.

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Larry Hansen, Esq.  
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The fact that we elect to advance any particular item of cost on behalf of the client shall not be deemed to create an obligation to advance the same or similar items of cost at any future time. Both legal services rendered and costs advanced by the firm will be billed on a monthly basis.

Payment. You shall make payment for the above legal services and costs within thirty days of the date of our monthly statement. In addition, during the course of the firm's representation, its lawyers may consult with experts and arrange for these experts to render services on your behalf. If this is done, we will require your direct payment to the experts and you agree that you will not only be responsible for the payment of those costs, but for any late charges and similar items.

Notice of Incorrect Billing Within Forty-Five Days. If, for any reason, you dispute all or any portion of any monthly statement rendered, you shall inform the undersigned in writing within forty-five days after receipt of the monthly statement. If there has been no such communication, the monthly statement shall be deemed by both the client and the firm to be correct and payable in full.

Interest on Past Due Amounts. In the event that any bill is not paid within forty-five (45) days of the date it was sent, the firm will be entitled to interest on that amount from that point forward at the rate of either ten percent (10%) per annum, or the highest rate permissible under the laws of the State of California, whichever is lower.

Additional Obligations of Client. You agree to cooperate with the firm to the extent necessary for the firm to discharge its duties under this agreement. Cooperation shall include, but not be limited to, attendance at all proceedings, meetings, conferences and other events at which your presence is required or requested; and providing the firm with any necessary documents and other information promptly following our request.

Supervising Attorney. Unless otherwise notified, the undersigned will be the attorney who will supervise your file. When necessary, however, that attorney may utilize other members of the firm, associates or paralegals, to assist with your legal matters. The decision of which attorney will be employed on any matter for you will be that of the law firm, unless we are specifically directed in writing to employ only certain personnel. If so directed, the fees for such personnel will be commensurately higher due to the exclusive utilization of such attorney's time.

Conflicts of Interest. Priority of Matters. We currently represent and may in the future represent other individuals, insurance companies, and organizations and persons who may be in competition with you. Your acceptance of the terms of this letter includes the fact that we may represent persons in competition with you. Furthermore, because of the many matters handled by the firm, matters for other clients may, in certain circumstances, be given priority over your matters, when in the judgment of the firm, the relative urgency of different matters dictates such priority.

**BARGER & WOLEN LLP**

Larry Hansen, Esq.  
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Retainer. In connection with our representation, we will require a retainer of \$10,000. You should keep in mind that the retainer is not an estimate of the total fees and costs. Those sums may far exceed the above retainer. We will bill you monthly with our current fees and charges, which you agree to pay within thirty days of the statement date. At our option, we may apply the retainer to unpaid charges and require reinstatement or an increase of the retainer. If any balance is remaining upon completion of services, we will return such balance. Please remit a check for the retainer along with the acknowledgment copy of this letter.

At-Will Termination. The firm and the client agree that either may terminate their relationship with the other at any time, for any or no reason, by notifying the other in writing.

Estimates. You acknowledge that it is impossible to know in advance the entire fees and costs for our representation. For example, if the work entails or concerns the prosecution or defense of litigation, or matters similar to litigation, a majority of the work is contingent upon the activities of our opponents and the developing exigencies of the litigation. Similar exigencies often develop in handling transactional matters. From time to time, you might ask us to estimate the cost of handling a particular phase of, or the rest of, the litigation or project, which we are handling on your behalf. We may endeavor to assist you in that regard. You should keep in mind, however, that such estimates are really "guesstimates" based on predictions of what work the other side, the court, or the exigencies of the litigation or project may require us to perform.

Arbitration of Disputes. You agree, as we do, that any dispute based upon or arising out of our engagement, this letter agreement, our fees and/or costs advanced on your behalf, and/or the performance or failure to perform services (including, without limit, claims of professional negligence) shall be submitted to arbitration before the American Arbitration Association, and that the decision of the Arbitrator(s) shall be binding on all parties. Any contention that fees should be offset, reduced, discharged, or eliminated because the services were performed improperly or below the standard of care for attorneys shall also be litigated in that arbitration.

You understand that submitting a matter such as this to arbitration constitutes a waiver of the right to have it tried by a jury and also imposes certain limitations on discovery procedures. Despite these facts, however, you agree, as do we, to arbitrate the above issues because of the relative speed and cost savings that often accompany arbitration proceedings.

Prior to signing this letter, you have been advised of the provisions of California Business & Professions Code Sections 6200-6204, including your right not to participate in fee arbitration and your right to trial following arbitration. Your agreement to participate in binding arbitration of any fee disputes under the rules of the American Arbitration Association is voluntary.

Attorneys' Fees. You agree, as we do, that the prevailing party in any arbitration or litigation arising out of or relating to our engagement, this letter agreement, any obligations

**BARGER & WOLEN LLP**

Larry Hansen, Esq.

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**EXHIBIT A****A. HOURLY RATES FOR LEGAL PERSONNEL**

Robert G. Levy	\$310
David J. McMahon	\$285
Dawn N. Valentine	\$240
Michael D. Haupt	\$235
Paralegals	\$110

**B. STANDARD CHARGES**

We charge for our time in minimum units of 0.1 hours.

**1. Costs and Expense**

In-office photocopying	\$0.25 per page
Mileage	0.365 per mile
Computerized legal research	Actual cost
Word processing	\$31.00 per hour
Clerical staff overtime	\$31.00 per hour
Facsimile	\$1.00 per page sent

**2. Subject to change**

The rates on this schedule are subject to reasonable increases that we mutually agreed upon.

## BARGER &amp; WOLEN LLP

Larry Hansen, Esq.  
November 25, 2003  
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created by this letter agreement, fees and/or costs advanced on your behalf, and/or the performance or failure to perform services (including, without limit, claims of breach of duty or professional negligence) shall be entitled to recover all attorneys' fees (including the value of time of attorneys in the firm at their normal billing rates), all experts' fees and expenses, and all costs (whether or not such costs are recoverable pursuant to the California Code of Civil Procedure) as may be incurred in connection with either obtaining or collecting any judgment and/or arbitration award, in addition to any other relief to which that party may be entitled.

Entire Agreement. This agreement supersedes any and all other agreements, either oral or in writing, between the client and the firm with respect to the subject of this agreement. This agreement contains all of the covenants and agreements between the parties with respect to the subject matter of this agreement, and each party to this agreement acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except those covenants and agreements embodied in this agreement. No agreement, statement, or promise not contained in this agreement shall be valid or binding.

Governing Law. The validity of this agreement and of any of its terms or provisions, as well as the rights and duties of the parties under this agreement, shall be construed pursuant to and in accordance with California law.

We are pleased to have this opportunity to be of service to you. If the foregoing meets with your approval, please date and sign the enclosed copy of this letter where indicated and return it to this office in the enclosed self-addressed envelope. By signing the enclosed copy, you acknowledge that this letter agreement is subject to binding arbitration as provided above.

Thank you for your courtesy and cooperation. We look forward to working closely with you.

Very truly yours,

  
For the Firm

ACCEPTED AND AGREED TO:  
On this \_\_\_\_ day of \_\_\_\_\_, 2003

\_\_\_\_\_  
[Signature on File]

**BARGER & WOLEN** LLP

650 California Street

Ninth Floor

San Francisco, California 94108

Telephone: (415) 434-2800

Facsimile: (415) 434-2533

**EXHIBIT D**

ROBERT G. LEVY  
(415) 743-3704  
rlevy@barwol.com

PLEASE REFER TO  
OUR FILE NUMBER:  
29251.001

November 26, 2003

**PRIVILEGED AND CONFIDENTIAL: ATTORNEY-CLIENT AND  
ATTORNEY WORK PRODUCT PRIVILEGES**

**VIA FACSIMILE**

Larry D. Hansen  
Council Member  
Lodi City Council  
Lodi, California

Re: City of Lodi, Proposed Legal Fee Audit

Dear Larry:

Further to our discussion yesterday, I write to provide an overview of our firm's proposed approach to the assignment the City of Lodi is considering engaging our firm to handle.

Our primary goal is to control the ongoing enormous transaction costs associated with the prospective cleanup. To this end, we propose (1) to perform a legal audit of the attorneys' and consultants' fees and costs, and (2) to analyze the enabling documents, most notably the Lehman financing agreement, but also the Envision fee contract. Based upon our findings and conclusions, we propose then to advise the City of its legal options regarding points (1) and (2).

Briefly to set forth some of the legal bases we believe the City could invoke, with respect to attorneys' fees, despite the terms of any fee agreement, under the California Business and Professions Code a lawyer may charge only "a reasonable fee," measured by criteria set forth in the code and other generally accepted ethical billing practices. Likewise, the United States Supreme Court has ruled that services for which a legal fee is charged must be "reasonable and necessary." With respect to contractual issues, a contract may be rescinded where it was formed under a mistake, where there has been misrepresentation (either actively or by negligent omission), and, sometimes, where there are changed circumstances and thus the contract no longer serves the purpose(s) for which it was created.

BARGER & WOLEN LLP

Larry D. Hansen

November 26, 2003

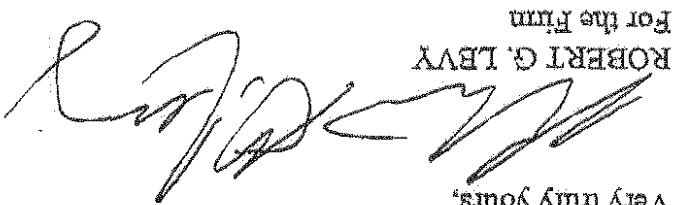
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To outline some of our assumptions, first, we believe that enough money probably is already available to fund the necessary cleanup, so long as unnecessary transaction costs can be avoided. Second, we firmly believe that the decision makers did the best they could at the time of the inception of the enabling agreements, given what they had to work with, what was disclosed to them, and the problem confronting them at the time. That does not mean, however, that such decisions cannot or should not now be changed.

In sum, we propose to take a reasoned, step-by-step, holistic approach to the problem of the ongoing transaction costs burdening the City, and to identify options for extricating the City from this problem. We approach this assignment entirely with an open mind, have no personal agenda with regard to anyone, and hope only to assist the City in accomplishing its goals with the available resources, without the need to tap ratepayers for further funds.

Please feel free to call if you would like to discuss any aspect of this.

Very truly yours,

  
ROBERT G. LEVY  
For the Firm

RGL:klc

cc: David J. McMahon

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**BARGER & WOLEN LLP****EXHIBIT E**650 California Street  
Ninth Floor

San Francisco, California 94108

Telephone: (415) 434-2800

Facsimile: (415) 434-2533

DAVID J. MCMAHON  
(415) 743-3706  
dcmahon@barwol.comPLEASE REFER TO  
OUR FILE NUMBER:  
29251.001

December 5, 2003

Larry D. Hansen  
Mayor  
City of Lodi  
221 West Pine Street  
P. O. Box 3006  
Lodi, California 95241-1910

Re: Disclosure of Potential Conflicts of Interest

Dear Mayor Hansen:

As you know, the City of Lodi (hereinafter "the City") is considering retaining Barger & Wolen LLP to represent its interests in connection with the following matters: (1) to perform a legal audit of the fees and costs incurred by the Envision Law Group ("Envision"), as well as various consultants and experts retained by it or by the City under Envision's direction; (2) to review and analyze the June 1, 2000 financing agreement entered into between the City and Lehman Brothers Inc. (denominated the "Program Receipts Sale and Repurchase Agreement"; and (3) to outline the legal remedies and other options available to the City with respect to issues and concerns that have arisen regarding items (1) and (2) above (the "Proposed Representation"). Because the interests of the City may involve the interests of some of Barger & Wolen's current and former clients, we believe it is best to disclose the potential conflicts of interest that may exist by reason of our representation of those clients and to obtain the City's informed written consent before proceeding with the representation.

**A. Barger & Wolen's Representation of Chubb**

As you know, Barger & Wolen was engaged to represent the interests of two subsidiaries of Chubb Insurance Company ("Chubb"), namely Pacific Indemnity Company ("Pacific") and Federal Insurance Company ("Federal"), in an action filed in 2000 in the San Francisco Superior Court, entitled *Hartford Accident Indemnity Company, et al. v. The City of Lodi, et al.*, Case No. 323658. Specifically, Hartford Insurance Company ("Hartford") and related entities sued Pacific, Federal and other insurers for declaratory relief and contingent contribution relating to the City's "liability" for defense and cleanup costs associated with contamination of the City's sewer system by PCE and other chemicals emanating primarily from dry cleaners in downtown Lodi (the "Cleanup Litigation"). The City thereafter filed a

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cross-complaint against all parties, including Pacific and Federal—two carriers it claimed to be its insurers. Following the filing of the City's cross-complaint, the other carriers to the Cleanup Litigation also filed cross actions against Pacific and Federal. However, on or about March 6, 2002, the City dropped Federal when it filed its first amended cross-complaint, and on or about September 12, 2003, the City dismissed Pacific on the eve of trial. All other carriers have since dismissed Pacific as well. The action has been stayed as to Federal and all other "excess" carriers. Thus, the City no longer maintains any claims against Pacific or Federal in the Cleanup Litigation, and Chubb is involved in the case only by virtue of the (stayed) cross-complaints against Federal. Nevertheless, in a superabundance of caution, should the City decide to retain Barger & Wolen in connection with the Proposed Representation, we will terminate our representation of Federal in the Cleanup Litigation.

**B. Barger & Wolen's Representation of Travelers Indemnity Company**

Our preliminary conflict check has also identified one other matter involving the City wherein we provided services to Travelers Indemnity Company ("Travelers") in the United States District Court for the Eastern District of California, entitled *American Stores Properties Inc. et al. v. City of Lodi et al.*, Case No. CIV S-97-1853. The scope of our representation in that action was extremely limited, consisting of assisting Travelers in responding to a third party subpoena that had been served on Travelers by lawyers for the City.<sup>1</sup> Travelers never appeared in the *American Stores* action as a party. Moreover, in November 2001, our involvement on behalf of Travelers terminated and the representation was transferred to the law firm of Perkins Coie. The last time that we provided any substantive work on the *American Stores* case was in November 2001.

**C. Barger & Wolen's Reporting to AIG Environmental**

As you may recall, the Lincoln Properties cleanup litigation was resolved by way of the purchase of an environmental remediation policy from AIG Environmental. At the early stages of the environmental litigation involving the City, AIG Environmental was likewise interested in the possibility of its ultimately providing a policy, or policies, of environmental remediation insurance to handle cleanup of the pollution in the City. In that the issues involved in the initial litigation involving cleanup of the City were complex, AIG Environmental retained Barger & Wolen to review public record documents and provide clarification as to what appeared to be transpiring in the litigation, with respect to the question as to when the ultimate cleanup of the contamination of the City might take place. Barger & Wolen provided AIG Environmental with the requested overview of the litigation, as of that time. The firm did no further reporting on the public record documents to AIG Environmental subsequent to January 2000.

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<sup>1</sup> Apparently, Travelers issued an insurance policy to Lucky Stores, which was subsequently purchased by Albertson's.

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**D. Potential Conflicts of Interest**

A conflict of interest exists when a lawyer's duty on behalf of one client obligates the lawyer to take action prejudicial to the interests of another client, i.e., "when in behalf of one client, it is his duty to contend for that which duty to another requires him to oppose." *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282. Conflicts of interest can be based on a lawyer's representation of two or more clients in a single dispute or transaction ("concurrent representation") or they can be based on a lawyer's representation of a client in one matter against a client in a different matter ("successive representation"). With respect to conflicts of interest based on concurrent representation, an attorney must receive the informed written consent of both clients before he or she can proceed with the representation. With respect to conflicts of interest based on successive representation, the attorney is only required to obtain the informed written consent of the client in the first matter. "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure.

Because Barger & Wolen no longer represents Travelers with respect to the subpoena in the *American Stores* action and because our involvement in that matter is completely unrelated to the Proposed Representation, we can conceive of no actual or potential conflict of interest created by our representation of the City in the Proposed Representation.

Likewise, because Barger & Wolen no longer is reporting to AIG Environmental on the various pieces of litigation concerning cleanup of the City and because our previous involvement in that regard is completely unrelated to the Proposed Representation, we can conceive of no actual or potential conflict of interest created by our representation of the City in the Proposed Representation.

Our representation of the Chubb entities in the Cleanup Litigation may constitute a somewhat different situation since we are being asked to review attorney bills submitted by Envision to the City in the very same litigation. To the extent Envision's bills contain information that is protected by the attorney-client privilege, Barger & Wolen would have access to that information creating a potential conflict of interest between our representation of Federal in the Cleanup Litigation and our representation of the City in the Proposed Representation. Conversely, from Chubb's perspective, the information obtained by Barger & Wolen in our representation of Federal arguably could be used by the City to the detriment of Chubb. However, given the fact that (1) the Proposed Representation does not contemplate – nor would Barger & Wolen, under any circumstances, ever become involved in – litigation against insurers in the Cleanup Litigation, (2) Federal and the City are no longer adverse in the Cleanup Litigation, and (3) the Envision attorney bills appear to be in the public domain (and non-privileged), we believe a conflict of interest is unlikely. Nevertheless, as an extra measure of caution, we are prepared to terminate forthwith our representation of Federal in the Cleanup Litigation in order to carry out our representation of the City in the Proposed Representation.

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Please do not hesitate to call if you wish to discuss the matters addressed herein at greater length. You are certainly privileged and welcome to consult other counsel concerning these matters, as well.

If you consent to our representation, please sign the consent form below and return it to us as soon as possible.

Very truly yours,


  
David J. McMahon  
For the Firm

CONSENT TO REPRESENTATION:

I, on behalf of the City of Lodi, being fully authorized to execute this document, have read and understand the attached letter dated December 4, 2003 disclosing the potential for a conflict of interest between the City of Lodi and Travelers Accident and Indemnity Company, AIG Environmental, and the Chubb Group of Insurance Companies. Notwithstanding the potential for a conflict, I hereby consent to Barger & Wolen LLP's representation of the City of Lodi in connection with the matters identified above.

Dated: December \_\_\_, 2003

THE CITY OF LODI

  
By: Larry D. Hansen, Mayor

# ENVISION LAW GROUP

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filed 12-9-03  
John Meyer

**TO:** Randall A. Hays, Esq.  
City Attorney

**FROM:** John C. Meyer, Esq.  
Assistant City Attorney  
ENVision Law Group, LLP

**DATE:** December 9, 2003

**SUBJECT:** Retention of Barger & Wolen, LLP, to Perform Audit of the City's Legal Invoices

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## INTRODUCTION

We have been advised of the City Council's decision, subject to the resolution of certain conflicts of interest<sup>1</sup>, to retain the law firm of Barger & Wolen, LLP to conduct a review of the legal invoices submitted to the City by our firm and our predecessor, Zevnik Horton Guibord & McGovern, LLP. While we continue to believe that the City may properly review our bills at any time it wishes, any such review should be done under the City's supervision by a provider that is neutral and independent so that any result will reflect a candid and unbiased assessment of those invoices. In fact, in light of concerns recently expressed by certain council members about supposed billing improprieties, ENVision Law Group, LLP welcomes such a review and an opportunity to address any concerns.

In any event and as recognized by the Council's contingent approval of this proposed retention, such a review must not be conducted by a law firm that is subject to **non-waivable** conflicts of interest. Moreover, even if the conflicts were such that they could be waived, the waiver of an actual conflict of interest to allow opposing counsel to be engaged to review the bills of the City's attorneys prosecuting actions against parties represented by that very law firm is unconscionable. In fact, a review by such an inherently biased firm cannot and will not produce a reliable work product upon which the City can act without facing a high degree of skepticism and distrust. As discussed below, Barger & Wolen is not only a firm with an extremely biased agenda in any review that it would conduct (given not only its primarily insurance industry client base, but also its past, personal history opposing the founding member of this firm, Michael Donovan), it is

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<sup>1</sup> We are informed that, to date, the City Council has not sought the advice of counsel on the scope of Barger & Wolen's disclosure or the legality of waiving the identified conflicts either from the City Attorney or by opinion from independent outside counsel. Failure to obtain advice of counsel may negate the validity of any consent granted.

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also a firm that is subject to both waivable and non-waivable conflicts of interest.<sup>2</sup> Accordingly, we respectfully urge the City to carefully analyze the authority pertaining to these conflicts of interests. Upon recognizing that the conflict at issue herein is not waivable, we urge the City to select an alternate firm to conduct this review.

## A. QUESTIONS ADDRESSED

1. Does Barger & Wolen have conflicts of interest?
2. Can Barger & Wolen's conflicts of interest be waived after full and informed disclosure to the City of Lodi ?
3. Can Barger & Wolen resolve its conflict by creating "ethical walls" or by terminating its representation of the other client so that it can undertake the representation of the City?
4. Can the City of Lodi proceed with an audit at this time if it so chooses?

## B. SHORT ANSWERS

1. **Yes.** Barger & Wolen has several existing conflicts of interest including the current representation of two of the City's liability insurers in *Hartford Accident & Indemnity Co. v. City of Lodi, et al.*, Case No. 323658 (Cal. Superior Ct. - San Francisco County)(hereinafter the "*Hartford* action" which is the City's action San Francisco Superior Court against its own insurers); the prior representation of Jack Alquist who is a primary defendant in *City of Lodi v. M&P Investments, et al.*, Case No. CIV S-00-2441 (E.D. Cal.)(Damrell, J.)(hereinafter the *M&P Investments* action which is the City's core action in federal court against the parties responsible for the PCE/TCE contamination within the Lodi Area of Contamination); and the prior representation of Travelers Indemnity Company in the *American Store Properties Inc., et al. v. the City of Lodi*, Case No. CV S-97-1853 FCD (E.D. Cal.) in light of the suit brought against the City of Lodi by Travelers Indemnity which is captioned *The Travelers Indemnity Company, et al. v. The City of Lodi, et al.*, Case No.

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<sup>2</sup> As outlined in our firm's memorandum of November 5, 2003, we have serious concerns regarding the significant, adverse consequences that a formal public audit undertaken at the present time will have upon the City's on-going, and predominantly successful efforts to recover the City's defense costs and upon our efforts to defend the City's interests in the ongoing litigation before Judge Damrell.

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02AS02008 (Cal. Superior Ct. - Sacramento County).

2. **No.** While the Rules of Professional Conduct of the State Bar of California provide that all potential and some actual conflicts of interest may be waived after full disclosure is made and informed written consent is given, certain actual conflicts of interest may not be waived. Specifically, neither an attorney nor a law firm may represent two separate clients in a single law suit where an **actual** conflict exists between those two clients. In fact, the California Supreme Court has stated that the most egregious conflict of interest is representation of clients whose interest are directly adverse in the same litigation. The rationale for this rule lies in the public policy that the paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the Bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. Accordingly, while Barger & Wolen's conflicts concerning its prior representations may be waived in writing after receiving informed consent, the actual conflict in the *Hartford* action arising out of the proposed concurrent representation of the Pacific Indemnity and Federal Insurance (collectively referred to as the "Chubb Companies") on the one hand and the City of Lodi on the other may not be waived.
3. **No.** For attorneys in private practice (as distinct from a former government attorney moving into private practice), constructing a so-called "ethical wall" within a single law firm is insufficient to cure a conflict of interest. When an attorney is disqualified from concurrent representation, the entire law firm is vicariously disqualified. Moreover, the size of the firm is immaterial, as is whether the firm is organized into different practice groups. Furthermore, the decision to drop one client (as proposed by Mr. Levy and Mr. McMahon) cannot cure the conflict. A law firm that knowingly undertakes adverse concurrent representation may not avoid disqualification by withdrawing from the representation of the less favored client before hearing.
4. **Yes.** While we have advised the City Council that the decision to conduct an audit at this time may have adverse impacts on the City's cost recovery claims, we have also advised the City Council that it free to conduct an audit at any time it deems appropriate. To do so, the City Council need only select a firm to conduct the audit that owes a duty of loyalty only to the City. In short, the sole requirement is selection of a firm that is independent and neutral so that it has no conflict of interest. While Barger & Wolen most certainly does **not** satisfy this criteria, there are numerous firms that provide this service that could be engaged by the City.

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## C. Facts

- A. Barger & Wolen is a law firm that *currently* represents two of the City's own insurance companies – Pacific Indemnity Company<sup>3</sup> and Federal Insurance Company – against both of which the City has brought claims in a pending lawsuit in San Francisco Superior Court. Indeed, both insurance companies which are represented by Barger & Wolen have interests directly adverse to the City in the ongoing insurance coverage matter (the Hartford Action). Barger & Wolen has a continuing duty of loyalty to both Pacific Indemnity and Federal in the above referenced action.
- B. Barger & Wolen is a law firm that represents the Travelers Indemnity Company. Travelers Indemnity Company has sued the City of Lodi in *The Travelers Indemnity Company, et al. v. The City of Lodi, et al.*, Case No. 02AS02008 (Cal. Superior Ct. - Sacramento County) – a case that remains pending. While Travelers is represented in the above-referenced Superior Court action by the Summit Law Group and Simpson Thacher & Bartlett, the fact remains that Travelers is a current client of Barger & Wolen. In addition, Travelers Indemnity was the subject of discovery in *American Store Properties Inc., et al. v. the City of Lodi*, Case No. CV S-97-1853 FCD (E.D. Cal.). Barger & Wolen represents Travelers and opposed the City for purposes of responding to the discovery in this federal action which also remains pending. In short, Barger & Wolen has a continuing duty of loyalty to Travelers.
- C. Barger & Wolen is a law firm that represented Fremont Indemnity Company in the matter captioned *Lincoln Properties Ltd. v. AIU Insurance Co.*, Case No. 238274 (Cal. Superior Ct. - San Joaquin County)(McNatt, J.) in which their client was compelled to pledge the policy limits to the clean up of Lincoln Center, as well as to pay significant monitoring and oversight costs in excess of those policy limits.
- D. Barger & Wolen is a law firm that, as Associate Remedial Liaison Counsel,

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<sup>3</sup> Based upon council minutes, we believe that Pacific Indemnity insured the City for multiple years in the early 1970's, preceding the USF&G term of coverage, which commenced on December 31, 1974. As you know, we recently dismissed Pacific Indemnity from the *Hartford* matter, as the City has been unable to locate additional evidence of coverage, other than the council minutes. That dismissal, however, was without prejudice, and Pacific Indemnity remains subject to be drawn back into the *Hartford* action if we can locate better evidence of coverage, such as portions of an actual policy. Thus, the dismissal does not eliminate the potential conflict of interest with respect to Pacific Indemnity.



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represented the Settling Dry Cleaning Defendants in the matter captioned *Lincoln Properties Ltd. v. Higgins, et al.*, Case No. CIV-S-91 760 (E.D. Cal.)(Levi, J.) Although apparently paid by the insurers that were subject to the orders issued in the above-referenced *AIU* action, Barger & Wolen's actual clients were the individual defendants in the *Higgins* action. These individual defendants specifically included Jack Alquist (and his dry cleaning operations) who is one of the primary defendants in the City's core enforcement action in federal court known as *City of Lodi v. M&P Investments, et al.*, Case No. CIV S-00-2441 (E.D. Cal.)(Damrell, J.).

## **D. Discussion of Questions Addressed**

### **1. Barger & Wolen Has Serious Conflicts of Interest**

At the outset, we note that Barger & Wolen has very real and very serious conflicts of interest – each of which should have been disclosed to the City *and cleared before* discussions between Barger & Wolen and the City's representatives began.<sup>4</sup> These conflicts include both continuing actual conflicts of interest and potential conflicts of interest. This proposed representation creates actual conflicts of interest in which Barger & Wolen would represent adverse parties in the same action, in which Barger & Wolen has represented adverse parties in unrelated actions, and in which Barger & Wolen would represent a current client that is adverse to a former client. In addition, Barger & Wolen has identified certain other potential conflicts of interest. Each of the actual conflicts of interest is described more fully below:

1. **Actual Conflict:** Barger & Wolen currently represents two of the City's own insurance carriers – Pacific Indemnity Company and Federal Insurance Company – in *Hartford Accident & Indemnity Co., et al. v. the City of Lodi*, Case No. 323658 (Cal. Superior Ct. - San Francisco County)(Kramer, J.). The *Hartford* matter, of course, concerns the City's disputes with its insurance carriers with respect to the defense and indemnity obligations of those carriers in the *M&P Investments* suit, and both Pacific and Federal are aligned *against the City* in that matter.

As counsel to Pacific and Federal, Barger & Wolen has taken the position that its clients do not owe the City a defense in the *M&P Investments* suit and are under no obligation to indemnify the City. Those insurance companies, however, *may ultimately be liable* for the City's costs of defense and to indemnify the City. It is,

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<sup>4</sup> We previously provided a conflict list to the City. Barger & Wolen's name appears on page 11 of that list.

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therefore, in the interests of Barger & Wolen's insurer clients for Messrs. Levy and McMahon to attack the invoices submitted to the City in order to minimize the amounts for which their insurer clients will be liable. In this respect, the interests of Barger & Wolen and its insurer clients are directly aligned with those of USF&G. Moreover, if they are retained, Barger & Wolen will be in the unique position of reviewing the privileged and confidential invoices reflecting the efforts of our firm to prove the contractual obligations of Barger & Wolen's insurer clients.

There can be no reasonable debate that this concurrent representation constitutes a direct and actual conflict of interest. Barger & Wolen would owe a duty of loyalty to multiple clients in the same action. The very matter to be reviewed as counsel for the City is precisely the same matter that is at issue concerning whether and to what extent Barger & Wolen's insurer clients will be liable for these fees and costs as claim expenses.

2. **Actual Conflict:** Barger & Wolen currently represents the Traveler Indemnity Company. Travelers Indemnity Company is adverse to the City of Lodi in two separate actions. Specifically, Travelers Indemnity Company has sued the City of Lodi in *The Travelers Indemnity Company, et al. v. The City of Lodi, et al.*, Case No. 02AS02008 (Cal. Superior Ct. - Sacramento County) – a case that remains pending. While Travelers is represented in the above-referenced Superior Court action by the Summit Law Group and Simpson Thacher & Bartlett, the fact remains that Travelers is a current client of Barger & Wolen. In addition, Travelers Indemnity was the subject of discovery in *American Store Properties Inc., et al. v. the City of Lodi*, Case No. CV S-97-1853 FCD (E.D. Cal.). Barger & Wolen represents Travelers for purposes of responding to the discovery in this federal action which also remains pending. In short, Barger & Wolen has a continuing duty of loyalty to Travelers.
3. **Actual Conflict:** As Associate Remedial Liaison Counsel in the *Lincoln Properties Ltd. v. Higgins, et al.* matter, Barger & Wolen represented Jack Alquist. Jack Alquist was found liable in the Lincoln Properties matter and, following the creation of a clean up fund and the selection of a Trustee to conduct the clean up at Lincoln Center, Jack Alquist was dismissed from that case. Significant funds from those insurers who issued policies to Jack Alquist were used to create the clean up fund.

Jack Alquist is also the owner of Guild Cleaners located within the City of Lodi and a primary defendant in the City's *M&P Investments* action. Moreover, the very same insurance policies that were the subject of the Lincoln Properties litigation are also

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the same policies at issue for Guild Cleaners in Lodi. As such, Barger & Wolen is in possession of confidential information relating to a former client and its insurers which is directly relevant and bears more than a substantial relationship between the present and former litigation.

4. **Potential Conflicts:** In addition to the potential conflicts identified in Barger & Wolen's letter dated December 5, 2003, it is important to note a more pervasive potential conflict. Even a cursory review of the statement of qualifications of Mr. levy and Mr. McMahon reflect that their area of practice lies in insurance litigation on behalf of numerous insurance industry clients (Travelers, Chubb, Fremont and AIG to name only those that have come up in the current disclosures). To the extent that these Barger & Wolen attorneys can claim any specialty, it is in minimizing environmental litigation costs *on behalf of the insurance industry* and to the detriment of insureds like the City. Indeed, this is precisely the role that Barger & Wolen played in the Lincoln Properties litigation where they sought to shut off all funds to Lincoln Properties for tactical advantage. With so many insurer clients and an unabashed loyalty to those clients, there is a significant potential that their fiduciary duty to the City will be, or perhaps already is, in conflict with their duty of loyalty and candor to their insurer clients. In short, there is no reason to believe that Barger & Wolen will not continue to represent the interests of their insurer clients while performing whatever audit they will undertake.

## **E. Only Some Of Barger & Wolen's Conflicts Can Be Cleared by Obtaining Written Waivers of Conflict After Providing Full Disclosure**

According to the California Supreme Court, the question of disqualification involves a conflict between the client's right to counsel of their choice and the need to maintain ethical standards of professional responsibility. See *People v. Speedee Oil Change Systems, Inc.*, (1999) 20 Cal.4th 1135, 1145. The paramount concern must be to preserve public trust in the scrupulous administration of justice and integrity of the bar. *Id.* The important right to counsel of one's choice must yield to ethical consideration that affect the fundamental principles of our judicial process. *Id.*

In California, the Rules of Professional Conduct govern the issue of conflicts of interest in California and dictate when and how an attorney may undertake competing representations of clients with actual or potential conflicts of interest. Pursuant to Rule 3-310 of the California Rules of Professional Conduct, the general rule is that an attorney may undertake the representation of clients with potential or actual conflicts of interest if the attorney first fully discloses the conflicts and then obtains informed, written consent. This general rule was promulgated in recognition of the client's

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strong interest in the right to retain counsel of its own choosing. Certain exceptions, however, exist to this general rule so as to ensure that attorneys maintain an undivided duty of loyalty to their clients and protect the integrity of the judicial process. Where an exception to the general rule applies, the courts conclude that any consent obtained is, by definition, neither intelligent nor informed. Accordingly, under these circumstances, no waiver is possible and the client must seek alternative representation. The following examines each of the conflicts identified above to explore how the Rules of Professional Conduct apply.

1. **Hartford Conflict:** In the *Hartford* action, Barger & Wolen represents the Pacific Indemnity and Federal Insurance which are both insurers of the City of Lodi in a case which pits the City against its own liability insurers in an insurance coverage dispute. In short, the City of Lodi seeks both the payment of its legal and technical costs of responding to claims against it relating to the environmental contamination within the soil and groundwater of the City of Lodi, as well as indemnity for any share of the liability which might be ascribed to the City for that contamination.

In response to these claims by the City, Barger & Wolen's insurer clients have denied that they owe any obligations to the City. In fact, despite City Council minutes in December 1974 articulating the selection of Pacific Indemnity as its insurer, Pacific Indemnity denies even the existence of a policy (just as USF&G denied the existence of its policies for years). This case remains active and the parties concretely adverse. While Pacific Indemnity has been dismissed without prejudice until such time as additional evidence of its policy is found, the City still has unmitigated claims against Pacific Indemnity. As for Federal Insurance Company, this one of the City's liability insurer remains an active party to the Hartford action. In its capacity as counsel for the Chubb Companies, Barger & Wolen owes these clients a fiduciary duty and an undivided duty of loyalty. *Ishmael v. Millington* (1966) 241 Cal. App. 2d 520, 526-527, 50 Cal. Rptr. 592. See *Santa Clara County Counsel Atty's Assn. v. Woodside* (1994) 7 Cal.4th 525, 547-548, fn. 6, 28 Cal. Rptr. 2d 617.

Despite this duty of loyalty to the insurers in the Hartford action, Barger & Wolen proposes to undertake a concurrent representation of the City of Lodi. There can be no argument that the City of Lodi is adverse to the Chubb Companies in the *Hartford* action. As the Supreme Court noted in *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-285, the effective functioning of the fiduciary relationship between the attorney and the client depends on the client's trust and confidence in counsel. The courts will protect the client's legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney client relationship. *Id.* Therefore, if an attorney – or more likely a law firm – simultaneously represents clients who have conflicting interests, a more stringent *per se* rule of disqualification applies. With few exceptions, disqualification follows automatically,

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regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other. *Id.* at p. 284.

The California Supreme Court in *Flatt* continued by stating that “the most egregious conflict of interest is representation of clients whose interests are directly adverse in the same litigation.” *Id.* at p. 284, fn. 3. Such patently improper dual representation suggests to the clients – and to the public at large – that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences. However, the attorney’s actual intention and motives are immaterial, and the rule of automatic disqualification applies.” *Id.* “This rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct,” but also to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their client’s rights. *People v. Speedee Oil Change Systems Inc.* (1999) 20 Cal.4th 1135, 1147 (quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116, 293 P. 788.)

In the present instance, the City seeks a review of the invoices of its legal and technical advisors which are the very same invoices that currently are, and will continue to be, at issue in the *Hartford* action. As such, there is an undeniable and continuing actual conflict between current clients who are adverse in ongoing litigation. “Common sense dictates that it would be unthinkable to permit an attorney to assume a position at trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.” *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 Cal. App. 4th 74, 97, 15 Cal. Rptr. 2d 585, 598. Therefore, despite the client’s purported informed written consent, counsel may not represent two clients at a hearing or a trial if there is an existing, actual conflict between them. In such circumstances, any purported ‘consent’ to the conflicting representation would be neither intelligent nor informed. *Id.* See also *Clem v. Superior Ct. (County of Fresno)* (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509, 512.<sup>5</sup>

In conclusion, this **actual** conflict in a concurrent representation where the interests are adverse in ongoing litigation, may **not** be waived and informed written consent will not cure

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<sup>5</sup> There is, of course, substantial additional authority that a conflict such as the one faced by Barger & Wolen cannot be waived. See, e.g., *McClure v. Donovan* (1947) 82 Cal. App. 2d 664, 666, 186 P.2d 718, 719 (“an attorney may not represent claims inconsistent with those of his client or conflicting claims of two clients”); *Dettamanti, v. Lompoc Union School District* (1956) 143 Cal. App. 2d 715, 723, 300 P.2d 78, 83 (“Where there is a duty of loyalty to different clients it is impossible for an attorney to advise either one as to a disputed claim against the other.”).

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the conflict.

2. **Traveler's Conflict:** The conflicts of interest that arise by virtue of Barger & Wolen's representation of the Traveler Indemnity Company differs from that in the *Hartford* action. In this circumstance, an actual conflict exists because Travelers is adverse to the City of Lodi and Barger & Wolen has an ongoing relationship with Travelers. In short, Barger & Wolen's representation of Travelers is in generally unrelated matters. Therefore, although adverse to the City, the actual conflict is treated by application of Rule 3-310(C) of the California Rules of Professional Conduct. Rule 3-310(C)(3) provides that:

A Member shall not, without informed written consent of each client, . . . represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

As the *The Travelers Indemnity Company, et al. v. The City of Lodi, et al.*, Case No. 02AS02008 (Cal. Superior Ct. - Sacramento County) is not directly related to the representation proposed to be undertaken by Barger & Wolen on behalf of the City of Lodi, this actual conflict may be addressed by obtaining informed written consent from both clients after providing full disclosure to each of them. Although complicated somewhat by the fact that Barger & Wolen represented Travelers in handling a discovery response to a non-party subpoena in *American Store Properties Inc., et al. v. the City of Lodi*, Case No. CV S-97-1853 FCD (E.D. Cal.), Rule 3-310(C) should still apply as Travelers is not a party to this action. Accordingly, with respect to this actual conflict the City of Lodi should demand a full disclosure in writing concerning the nature and extent of Barger & Wolen's relationship with Travelers.

3. **Alquist Conflict:** The conflict of interest arising from Barger & Wolen's prior representation of Jack Alquist in the *Lincoln Properties Ltd. v. Higgins, et al.* matter differs again in nature from those conflicts arising from either the *Hartford* Action or the *Travelers* action. In this instance, Barger & Wolen represented Jack Alquist in a matter from which Mr. Alquist has been dismissed and, as far as has been disclosed, there is no continuing relationship between Barger & Wolen and Mr. Alquist. In essence, Mr. Alquist is a former client. Now Barger & Wolen proposes to take on a new client where the new client is adverse to the former client.

In such cases where the conflict results from successive - as opposed to concurrent - representations, a lesser standard applies. In such cases, it is the duty of confidentiality that

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is at issue rather than the duty of loyalty. *Forrest v. Baeza* (1997) 58 Cal. App. 4th 65, 73. Accordingly, disqualification is prescribed only where there is a substantial relationship between the prior representation and the current representation. Here, there is clearly a substantial relationship.

In the former representation of Mr. Alquist, the issues involved his customs and operating practices of his dry cleaning operations in Stockton California. That representation also involved litigation with Mr. Alquist's insurers under certain commercial general liability insurance policies. The current litigation in which the City of Lodi is adverse to Mr. Alquist involves, once again, Mr. Alquist's custom and operating practices of his dry cleaning operations using substantially identical equipment and also involves coverage by Mr. Alquist's insurers under the very same insurance policies at issue in the prior litigation. As such, there can be no debate that a substantial relationship exists. Accordingly, disqualification is prescribed.

Despite this substantial relationship, Rule 3-310(E) of the California Rules of Professional Conduct provides that this actual conflict may be addressed by obtaining "the informed written consent of the client and the former client . . . ." Therefore, Barger & Wolen must fully disclose in writing all facts relevant to the prior representation and make a similar disclosure to Mr. Alquist before obtaining informed written consent from both the former and prospective client. As regards this actual conflict, until such time as both waivers are obtained, Barger & Wolen must be disqualified.

4. **Potential Conflicts:** As noted above, Barger & Wolen is also subject to a more pervasive potential conflict arising from its extensive and close relationship with numerous insurance company clients. In the face of an innovative program that is designed to compel insurers of responsible parties to pay for the investigation and clean up of environmentally contaminated sites in response to local governmental authority, Barger & Wolen is confronted with potentially severely divided loyalties. Barger & Wolen is a recognized insurance defense firm that has longstanding relationships with many long standing and substantial clients whose interests will be adversely affected by the successful resolution of the City's current environmental litigation program. In fact, Barger & Wolen has marketed itself to the City of Lodi based, in large part, on its role as the insurers point men in the Lincoln Properties litigation to perform the same tasks that they now propose to perform for the City. As such, the inherent bias and potentially divided loyalty raises significant questions about the integrity of any result from their review.

In any event, Rule 3-310(C)(1) provides that a Member of the State Bar shall not, without the informed written consent of each client, accept representation of more than one client in



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a matter in which the interests of the clients potentially conflict. As potential conflicts may be waived by obtaining informed written consent, the City may waive this conflict if it so chooses after receiving a full and candid disclosure. It is important to note, however, that despite any waiver granted by the City Council, the retention of opposing counsel to challenge the work of its own lawyers will be inherently suspect. The Council would be well served to consider the consequences of selecting inherently biased counsel to undertake this project in lieu of readily available neutral and independent counsel who could just as ably perform the same tasks.

## **F. Barger & Wolen Cannot Resolve its Conflict by Creating “Ethical Walls” or by Terminating its Representation of the Other Client So That it Can Undertake the Representation of the City**

In prior representations to the City Council and in its letter dated December 5, 2003, Mr. McMahon and Mr. Levy have suggested that Barger & Wolen could resolve its actual conflicts by creating an “ethical wall” around those other attorneys in the firm who trigger the conflict. Alternatively, they have suggested a willingness to discharge the Chubb Companies representation in order to continue with this representation. Neither of these alternatives is permissible under the California Rules of Professional Conduct.

In California, where an attorney is disqualified from concurrent representation, the entire law firm is vicariously disqualified. *See generally, Henriksen v. Great American Savings & Loan* (1992) 11 Cal. App. 4th 109, 114, 14 Cal. Rptr. 2d 184, 187; *see also* ABA Model Code DR-5-105(D). The size and organization of the firm is irrelevant to the application of this rule. *Truck Insurance Exchange v. Fireman’s Funds Insurance Co.* (1992) 6 Cal. App. 4th 1050, 1059-60. In fact, under certain circumstances not present here, ethical walls may be employed to cure a conflict of interest where the representation of the two clients is not concurrent, or where the attorney generating the conflict is a former government lawyer just entering private practice and the conflict arises by virtue of his prior public employment. Given the nature of the *Hartford* conflict as described above, ethical walls will **not** cure Barger & Wolen’s conflict of interest in this matter.

Similarly, California law rejects the tactic of discharging one client so as to retain a more favored client. Commonly referred to as the “Hot Potato” rule, California law does not permit an attorney representing clients whose interests conflict to avoid disqualification by dropping one client in favor of the other in order resolve the conflict. *Id.* It is also important to note that a conflict based on divided duties of loyalty cannot be resolved by waiving the attorney-client privilege. While such a waiver may obviate the concerns over confidentiality, such a waiver does nothing to cure the divided duty of loyalty.



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## **G. The City of Lodi can proceed with an audit at this time if it so chooses.**

Simply stated, the City can clearly proceed with an audit at this time if it so chooses. The City must simply select a firm to conduct the review that is not subject to an unwaivable conflict of interest. As then Council Member Hansen has acknowledged, he interviewed only one firm when seeking an auditor to conduct the currently proposed review. All other firms and attorneys interviewed were addressed at a time when Mr. Hansen sought a firm to review the legal strategy. As such, the City has not yet sought out the availability of non-conflicted firms to provide the desired service. Barger & Wolen is certainly not the only firm that provides these services and the City should be able to locate in a relatively short time frame alternative service providers to conduct this review.

## **E. CONCLUSION**

To summarize, while the City obviously cannot retain opposing counsel for Guild Cleaners or USF&G to do an audit, hiring Barger & Wolen is just about the same thing. Due to serious conflicts of interest – non-waivable actual conflicts, waivable actual conflicts, and potential conflicts that are entirely unseemly and antithetical to City's goal of a supportable and credible review of the billings at issue, Barger & Wolen cannot and should not be retained. We urge the City Council to retain a firm that is not subject to these conflicts to perform the designated tasks. Failure to do so will taint any resulting report and recommendation, rather than provide a basis to address any issues that might be raised by a competent, neutral and independent reviewer.